

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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ALDO MARONES,

Petitioner,

v.

STATE OF NEVADA, *et al.*,

Respondents.

Case No. 3:18-cv-00447-MMD-WGC

ORDER

**I. SUMMARY**

Petitioner Aldo Marones filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. This matter is before the Court for adjudication of the merits of Marones' amended petition ("Amended Petition"). For the reasons discussed below, the Court denies the Amended Petition and a certificate of appealability.

**II. BACKGROUND**

Marones' convictions are the result of events that occurred in Clark County, Nevada on or between November 12, 2013, and November 13, 2013. (ECF No. 11-3.) A 7-Eleven cashier testified that at approximately 11:00 p.m. on November 12, 2013, he noticed an individual, later identified as Marones, outside the store "gazing at [him]" suspiciously while wearing gloves. (ECF No. 13-1 at 76–77, 79–82.) Marones "popp[ed] his head into the store," questioned the cashier about why he was looking at him, and then threatened the cashier to "not look at [him]." (*Id.* at 84.) Marones entered the store a second time, again telling the cashier not to look at him. (*Id.* at 85.) While the cashier was on the telephone with a 9-1-1 operator, Marones entered the store a third time and told the cashier to put the telephone down. (*Id.* at 87.) Marones then went behind the

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1 cashier's counter and showed the cashier a gun he was holding. (*Id.* at 88–89.) The  
2 cashier told Marones to leave, and Marones “took some cigarette boxes” without paying  
3 and left. (*Id.* at 92.)

4 Following a jury trial, Marones was found guilty of burglary while in possession of  
5 a firearm, carrying a concealed firearm or other deadly weapon, and robbery with the  
6 use of a deadly weapon. (ECF No. 14-4.) Marones was sentenced to 4 to 10 years for  
7 the burglary conviction, 12 to 36 months for the concealed firearm conviction, and 4 to  
8 10 years for the robbery conviction plus a consecutive term of 4 to 10 years for the  
9 deadly weapon enhancement. (ECF No. 14-7.) Marones appealed, and the Nevada  
10 Court of Appeals affirmed on September 15, 2015. (ECF No. 17-5.) Remittitur issued on  
11 October 27, 2015. (ECF No. 17-6.)

12 Marones filed three state habeas corpus petitions on February 11, 2015, August  
13 13, 2015, and August 25, 2016, respectively. (ECF Nos. 17-7, 17-8, 18-6.) The state  
14 district court denied Marones' petition on February 8, 2017. (ECF No. 18-10.) Marones  
15 appealed, and the Nevada Court of Appeals affirmed on November 16, 2017. (ECF No.  
16 18-15.) Remittitur issued on December 14, 2017. (ECF No. 18-16.)

17 Marones filed a federal habeas corpus petition on September 17, 2018. (ECF No.  
18 1-1.) This Court ordered Marones to file an amended first page of the petition to name  
19 the correct Respondent. (ECF No. 5.) Marones complied on December 10, 2018. (See  
20 ECF No. 6.) This Court ordered the Clerk of the Court to file the original petition (ECF  
21 No. 1-1) and the amended first page of the petition (ECF No. 6) together in one  
22 document and to have this new document reflected in the docket as Marones' Amended  
23 Petition. (ECF No. 7.)

24 The Amended Petition has a filing date of December 12, 2018 and alleges two  
25 violations of Marones' federal constitutional rights: his trial counsel failed to consult with  
26 him about his appellate rights and failed to file an appeal on his behalf. (ECF No. 8.)  
27 Respondents answered Marones' Amended Petition on January 25, 2019. (ECF No.  
28 10.) Marones replied on March 1, 2019. (ECF No. 19.)

### 1      **III.      LEGAL STANDARD**

2            28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in  
3      habeas corpus cases under the Antiterrorism and Effective Death Penalty Act  
4      (“AEDPA”):

5            An application for a writ of habeas corpus on behalf of a person in custody  
6            pursuant to the judgment of a State court shall not be granted with respect  
7            to any claim that was adjudicated on the merits in State court proceedings  
                unless the adjudication of the claim --

8            (1) resulted in a decision that was contrary to, or involved an  
9            unreasonable application of, clearly established Federal law, as  
                determined by the Supreme Court of the United States; or

10           (2) resulted in a decision that was based on an unreasonable  
11           determination of the facts in light of the evidence presented in the  
12           State court proceeding.

13      A state court decision is contrary to clearly established Supreme Court precedent, within  
14      the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the  
15      governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts a  
16      set of facts that are materially indistinguishable from a decision of [the Supreme] Court.”  
17      *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362,  
18      405–06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision  
19      is an unreasonable application of clearly established Supreme Court precedent within  
20      the meaning of 28 U.S.C. § 2254(d) “if the state court identifies the correct governing  
21      legal principle from [the Supreme] Court’s decisions but unreasonably applies that  
22      principle to the facts of the prisoner’s case.” *Id.* at 75 (quoting *Williams*, 529 U.S. at 413).  
23      “The ‘unreasonable application’ clause requires the state court decision to be more than  
24      incorrect or erroneous. The state court’s application of clearly established law must be  
25      objectively unreasonable.” *Id.* (quoting *Williams*, 529 U.S. at 409–10) (internal citation  
26      omitted).

27            The Supreme Court has instructed that “[a] state court’s determination that a  
28      claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could

1 disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562  
2 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The  
3 Supreme Court has stated "that even a strong case for relief does not mean the state  
4 court's contrary conclusion was unreasonable." *Id.* at 102 (citing *Lockyer*, 538 U.S. at  
5 75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the standard as  
6 a "difficult to meet" and "highly deferential standard for evaluating state-court rulings,  
7 which demands that state-court decisions be given the benefit of the doubt" (internal  
8 quotation marks and citations omitted)).

#### 9 IV. DISCUSSION

10 Marones' two grounds for relief involve claims that his trial counsel was  
11 ineffective. (See ECF No. 8 at 6–8.) In *Strickland*, the Supreme Court propounded a  
12 two-prong test for analysis of claims of ineffective assistance of counsel requiring the  
13 petitioner to demonstrate (1) that the attorney's "representation fell below an objective  
14 standard of reasonableness," and (2) that the attorney's deficient performance  
15 prejudiced the defendant such that "there is a reasonable probability that, but for  
16 counsel's unprofessional errors, the result of the proceeding would have been different."  
17 *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). A court considering a claim of  
18 ineffective assistance of counsel must apply a "strong presumption that counsel's  
19 conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.  
20 The petitioner's burden is to show "that counsel made errors so serious that counsel  
21 was not functioning as the 'counsel' guaranteed the defendant by the Sixth  
22 Amendment." *Id.* at 687. Additionally, to establish prejudice under *Strickland*, it is not  
23 enough for the habeas petitioner "to show that the errors had some conceivable effect  
24 on the outcome of the proceeding." *Id.* at 693. Rather, the errors must be "so serious as  
25 to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. The  
26 *Strickland* standard is also utilized to review appellate counsel's actions: a petitioner  
27 must show "that [appellate] counsel unreasonably failed to discover nonfrivolous issues  
28 and to file a merits brief raising them" and then "that, but for his [appellate] counsel's

1 unreasonable failure to file a merits brief, [petitioner] would have prevailed on his  
2 appeal.” *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

3 Where a state district court previously adjudicated the claim of ineffective  
4 assistance of counsel under *Strickland*, establishing that the decision was unreasonable  
5 is especially difficult. See *Harrington*, 562 U.S. at 104–05. In *Harrington*, the United  
6 States Supreme Court clarified that *Strickland* and § 2254(d) are each highly deferential,  
7 and when the two apply in tandem, review is doubly so. *Id.* at 105; see also *Cheney v.*  
8 *Washington*, 614 F.3d 987, 995 (9th Cir. 2010) (internal quotation marks omitted)  
9 (“When a federal court reviews a state court’s *Strickland* determination under AEDPA,  
10 both AEDPA and *Strickland*’s deferential standards apply; hence, the Supreme Court’s  
11 description of the standard as doubly deferential.”) The Supreme Court further clarified  
12 that, “[w]hen § 2254(d) applies, the question is not whether counsel’s actions were  
13 reasonable. The question is whether there is any reasonable argument that counsel  
14 satisfied *Strickland*’s deferential standard.” *Harrington*, 562 U.S. at 105.

15 In Marones’ appeal of the denial of his state habeas petition, the Nevada Court  
16 of Appeals held:

17 First, Marones claimed his counsel was ineffective for failing to file a notice  
18 of appeal and pursue a direct appeal. Marones cannot demonstrate he is  
19 entitled to relief because he filed a pro se notice of appeal and his counsel  
20 represented him during the appellate proceedings. In addition, this court  
21 considered Marones’ direct appeal and affirmed the judgment of conviction.  
22 *Marones v. State*, Docket No. 67312 (Order of Affirmance, September 15,  
23 2015). Therefore, we conclude the district court did not err in denying this  
24 claim.

25 Second, Marones claimed his counsel was ineffective for failing to file  
26 appellate briefs or other documents in support of his direct appeal. Marones  
27 cannot demonstrate either deficiency or prejudice for his claim because his  
28 counsel filed a fast track statement and an appendix in support of Marones’  
direct appeal. Therefore, we conclude the district court did not err in denying  
this claim.

Third, Marones appeared to assert his counsel was ineffective for failing to  
raise errors Marones believed occurred during the trial as claims on direct  
appeal. Marones also appeared to claim his counsel was ineffective for  
failing to consult with him regarding the direct appeal. Marones failed to

demonstrate his counsel's performance was deficient or resulting prejudice. Marones did not identify any claims counsel should have raised on direct appeal and did not explain how consultation with his counsel would have benefitted him. Bare claims, such as these, are insufficient to demonstrate a petitioner is entitled to relief. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, we conclude the district court did not err in denying this claim.

(ECF No. 18-15 at 3-4.)

The Nevada Court of Appeals' rejection of Marones' *Strickland* claims was neither contrary to nor an unreasonable application of clearly established law as determined by the United States Supreme Court. The Court will address the two ineffective-assistance-of-counsel claims in turn below.

#### **A. Ground 1**

In Ground 1, Marones alleges that his trial counsel failed to consult with him about his appellate rights in violation of his Sixth Amendment rights even though his trial counsel knew he wanted to appeal. (ECF No. 8 at 6.) In his reply, Marones appears to argue that if his trial counsel had consulted with him, he would have instructed his trial counsel to have included the following claims in his direct appeal: a sufficiency-of-the-evidence claim and a claim that the state district court erred in denying his motion to dismiss.<sup>1</sup> (ECF No. 19 at 3.)

During his sentencing hearing, the following colloquy took place between Marones and the state district court:

[Marones]: – would like to thank Your Honor and [trial counsel] and also the DA for your valuable time. And I would like to inform my attorney and the courts that I would like – I want a writ of habeas corpus filed on my behalf and the Court to appoint me with an appellate counsel for a direct appeal.

THE COURT: You want to file an appeal?

[Marones]: For a direct appeal.

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<sup>1</sup>Marones also appears to argue that appellate counsel should have been appointed. (ECF No. 19 at 5.) This claim lacks merit as Marones' trial counsel was appointed as his appellate counsel during his sentencing hearing. (See ECF No. 14-6 at 10.)

1 THE COURT: Okay. Then you want to file an – you want a direct  
2 appeal to the Nevada Supreme Court?

3 [Marones]: Yes, ma'am.

4 THE COURT: Okay. [Trial counsel], you'll make sure his notice of  
5 appeal gets filed?

6 [Trial counsel]: I discussed that with him, Your Honor. Yes.

7 THE COURT: Okay, thank you.

8 (ECF No. 14-6 at 6.) Later, Marones' trial counsel and the state district court had the  
9 following discussion:

10 [Trial counsel]: And, Your Honor, as Mr. Marones indicated, he is  
11 requesting that I file an appeal on his behalf.

12 THE COURT: Sure.

13 [Trial counsel]: I would be appointed for the same and I will certainly  
14 do so –

15 THE COURT: Absolutely.

16 [Trial counsel]: – within 30 days of the filing of the JOC.

17 THE COURT: Okay.

18 (*Id.* at 10.)

19 On December 30, 2014, twelve days after his sentencing hearing, Marones'  
20 judgment of conviction was filed. (ECF No. 14-7 at 2.) Marones filed a notice of appeal  
21 on his own behalf on January 22, 2015. (ECF No. 14-8 at 2.) Marones' trial counsel—  
22 now his appellate counsel—filed a fast track appellate statement and appendix on April  
23 15, 2015. (ECF Nos. 15-1, 16-1, 17-1; ECF No. 17-2 at 2.) Marones' fast track statement  
24 included two issues: (1) the admission of lay opinion testimony regarding the contents  
25 of the admitted security video violated evidentiary standards, depriving Marones of his  
26 rights to due process and an impartial jury, and (2) the state district court erred when it  
27 denied Marones' motion for a mistrial after the State elicited prior bad act testimony.

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1 (ECF No.17-2 at 6.) The State responded on May 5, 2015. (ECF No. 17-3.) The Nevada  
2 Court of Appeals affirmed Marones' judgment of conviction. (ECF No. 17-5.)

3 The *Strickland* "test applies to claims . . . that counsel was constitutionally  
4 ineffective for failing to file a notice of appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 477  
5 (2000). "[C]ounsel has a constitutionally imposed duty to consult with the defendant  
6 about an appeal when there is reason to think either (1) that a rational defendant would  
7 want to appeal . . . , or (2) that this particular defendant reasonably demonstrated to  
8 counsel that he was interested in appealing." *Id.* at 480. Consulting means "advising the  
9 defendant about the advantages and disadvantages of taking an appeal, and making a  
10 reasonable effort to discover the defendant's wishes." *Id.* at 478.

11 Here, Marones' interest in appealing his judgment of conviction was clear.  
12 Indeed, Marones requested such an appeal before the state district court at his  
13 sentencing hearing. (See ECF No. 14-6 at 6.) That being considered, as the Nevada  
14 Court of Appeals reasonably concluded (see ECF No. 18-15 at 4), Marones fails to  
15 demonstrate that his trial counsel was deficient for failing to consult with him about his  
16 appellate rights. *Strickland*, 466 U.S. at 688. In fact, Marones' trial counsel indicated at  
17 the sentencing hearing that he "discussed [Marones' notice of appeal] with him." (ECF  
18 No. 14-6 at 6.) The fact that Marones' trial counsel consulted with him about his appellate  
19 rights is confirmed by Marones' own statements at the sentencing hearing that he knew  
20 he had a right to a direct appeal and wanted to assert that right. *See Flores-Ortega*, 528  
21 U.S. at 478.

22 However, even if Marones' trial counsel was deficient, as the record is silent as  
23 to what consultation actually took place, the Nevada Court of Appeals also reasonably  
24 concluded that Marones failed to demonstrate prejudice. (See ECF No. 18-15 at 4.) In  
25 order "to show prejudice [from a lack of consultation regarding a notice of appeal], a  
26 defendant must demonstrate that there is a reasonable probability that, but for counsel's  
27 deficient failure to consult with him about an appeal, he would have timely appealed."

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1 *Flores-Ortega*, 528 U.S. at 484. Marones cannot meet this burden, as he did timely file  
2 a notice of appeal on his own behalf. (ECF No. 14-8 at 2.)

3 Because the Nevada Court of Appeals reasonably determined that Marones'  
4 ineffective-assistance-of-counsel claim lacked merit, Marones is denied federal habeas  
5 relief for Ground 1.

## 6 **B. Ground 2**

7 In Ground 2, Marones alleges that his trial counsel failed to file an appeal on his  
8 behalf in violation of his Sixth Amendment rights even though Marones and the state  
9 district court both instructed Marones' trial counsel to do so. (ECF No. 8 at 8.)

10 "The timely filing of a notice of appeal is jurisdictional and is an essential  
11 prerequisite to the perfection of an appeal." *Scherer v. State*, 89 Nev. 372, 374, 513  
12 P.2d 1232, 1233 (1973); see also Nev. R. App. Pro. 3(a) ("[A]n appeal permitted by law  
13 from a district court may be taken only by filing a notice of appeal with the district court  
14 clerk."). In a criminal case, this notice of appeal "shall be filed with the district court clerk  
15 within 30 days after the entry of the judgment or order being appealed." Nev. R. App.  
16 Pro. 4(b)(1)(A). For fast track criminal appeals, Nevada Rule of Appellate Procedure  
17 3C(b)(2) provides that "[t]rial counsel shall file the notice of appeal, rough draft transcript  
18 form, and fast track statement and consult with appellate counsel for the case regarding  
19 the appellate issues that are raised."

20 Because Marones' judgment of conviction was filed on December 30, 2014 (see  
21 ECF No. 14-7 at 2), Marones' notice of appeal was required to be filed by January 29,  
22 2015. See Nev. R. App. Pro. 4(b)(1)(A). Marones filed a notice of appeal on his own  
23 behalf on January 22, 2015 before the deadline (see ECF No. 14-8 at 2) so it is not clear  
24 that Marones' trial counsel acted deficiently. *Strickland*, 466 U.S. at 688. Indeed,  
25 Marones' trial counsel had seven more days to timely file the notice of appeal. The fact  
26 that Marones beat his trial counsel to filing the document does not demonstrate that  
27 Marones' trial counsel acted unreasonably. Accordingly, because the Nevada Court of  
28 Appeals reasonably determined that Marones could not demonstrate that he was

1 entitled to relief based on his *Strickland* claim (ECF No. 18-15 at 3), Marones is denied  
2 federal habeas relief for Ground 2.

3 **V. CERTIFICATE OF APPEALABILITY**

4 This is a final order adverse to Marones. Rule 11 of the Rules Governing Section  
5 2254 Cases requires this Court to issue or deny a certificate of appealability (COA).  
6 Therefore, this Court has *sua sponte* evaluated the claims within the petition for suitability  
7 for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851,  
8 864–65 (9th Cir. 2002). Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when  
9 the petitioner “has made a substantial showing of the denial of a constitutional right.” With  
10 respect to claims rejected on the merits, a petitioner “must demonstrate that reasonable  
11 jurists would find the district court’s assessment of the constitutional claims debatable or  
12 wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S.  
13 880, 893 & n.4 (1983)). Applying this standard, the Court finds that a certificate of  
14 appealability is unwarranted.

15 **VI. CONCLUSION**

16 It is therefore ordered that the Amended Petition for a Writ of Habeas Corpus  
17 Pursuant to 28 U.S.C. § 2254 (ECF No. 8) is denied.

18 It is further ordered that Petitioner is denied a certificate of appealability.

19 The Clerk of the Court is directed to enter judgment accordingly and close this  
20 case.

21 DATED THIS 17<sup>th</sup> day of June 2020.

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23 

24 MIRANDA M. DU  
25 CHIEF UNITED STATES DISTRICT JUDGE  
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